No. 14854

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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JURISDICTION

The appellant has correctly stated the jurisdictional matters in reference to the jurisdiction of the District Court as well as the jurisdiction of this Court.

QUESTIONS PRESENTED

The question presented is not whether the Tribal Council of the White Mountain Apache Indian Tribe has the power to exclude white men from using the range within the border of the reservation for grazing, nor is the question the right of the Council to regulate grazing by members of the Tribe.

The questions to be determined in this case are:

1) The interpretation and application of Article VIII of the Tribal Constitution.

Numbers following the letter 'R' refer to pages of the Transcript of Record.

2) Did the defendants have vested rights or rights of occupancy of long established allocation which Ordinance 22 (R 17) was ineffectual to change or abrogate?

3) Do those rights include grazing privileges as well as dwelling places and improvements?

STATEMENT

The statement of the facts in this case can best be made by referring to the findings of fact (R 27-34).

In 1872, one Corydon Cooley, a white man, married an Apache Indian and shortly thereafter began raising cattle in the vicinity of McNary and Pinetop territory of Arizona, or what is now a part of the Indian Reservation. In 1894, their daughter, Bell Cooley, married a white man named Ambrose Amos who settled in the vicinity of Big Spring (which is the same vicinity where defendants were grazing their cattle). Elsie West, the wife of Earl West, both defendants in this case, is the daughter of Bell Cooley and Abraham Amos. Earl West and Elsie Amos, now Elsie West, were married in 1922 and ever since have been husband and wife, and they have grazed cattle on the Apache Indian Reservation since 1923 and their children, the other defendants in this case, have owned and grazed cattle on the reservation for several years prior to 1953.

In 1926, the then superintendent of the reservation gave permission to the Amos and the West families to graze cattle on part of the reservation near Big Spring where they were grazing cattle at the time they were seized by the superintendent of the reservation.

In 1936, William Donner, then superintendent, gave permission to the West family, including all of the defendants then alive, to graze cattle on that part of the reservation near Big Spring. At that time, the defendants surrendered part of the range and in lieu thereof superintendent Donner gave permission for them to graze cattle on another part of the reservation north and west of Highway 60 (R 32).

Since 1924, the defendants have made valuable improvements on the premises near Big Spring and west of Highway 60, consisting of dwelling houses, fences, wells and water tanks. And, since 1926, the defendants and the Amos family are the only ones who have regularly run cattle in that area up to April of 1954.

In April of 1954, the superintendent of the reservation seized and removed from the premises, where they had been grazing, all of the cattle belonging to the defendants and removed them to another part of the reservation and retained possession thereof until after the judgment in this case in the District Court; at the time of the seizure and removal of the said cattle, no process or orders had been issued from any Court or from any department of the Government.

The Constitution of the White Mountain Apache Tribe was adopted and approved in August of 1938. A pertinent part of this Constitution is Article VIII (R 50), which for ready reference we deem advisable to set out in full:

> "The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in

> severality, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances."

In August of 1953, the Tribal Council passed Ordinance 22 (R 10-17). The provisions of this Ordinance which the appellants rely upon as justification for the removal of the defendants' cattle are set out at Page 3 of the Appellant's Brief.

ARGUMENT

Article III of Ordinance 22 (R 15) which attempts to provide that "right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this Ordinance ***" is clearly in violation of Article VIII of the Constitution. This is made clear by the interpretation of Article VIII by the Department of Interior itself as expressed in a letter of the Assistant Secretary, Exhibit 6 (R 87-89). The Department refused to approve an Ordinance which was submitted at that time giving the following reasons:

> "It might be desirable also to suggest to the tribal council that any *grazing ordinance* which it may adopt must take into account the provision of Article VIII of the tribal constitution, which contemplates that long-established rights of occupancy and improvements shall be protected. The record indicates that there are at least two families on the reservation — the West family and the Amos family — who might be adversely affected by the

> adoption *of a grazing ordinance* such as that under consideration, which limits the issuance of grazing permits only to livestock associations. As it is not clear from the present record whether established rights of occupancy and improvements would be protected by the proposed ordinance, a full report on this aspect of the situation should be made." (Emphasis supplied.)

This quotation clearly shows that the drafters of Article VIII and the Department had in mind no intention of limiting the right of the parties to mere residences on the reservation but that grazing rights were also protected.

It is also our contention that Paragraphs f, g, h, and i of Ordinance 22 (R 13) have application only to that part of the reservation upon which grazing permits have been issued to stock associations.

The Court held, as a matter of law (R 34), that Ordinance No. 22 of the White Mountain Apache Tribe is ineffectual to change or abrogate the rights of the defendants on the reservation land. We respectfully submit that this is the correct statement of the law and the proper interpretation of the Constitution.

The attempt of the appellant to draw an analogy between the situation here and under the Taylor Grazing Act is without merit. Article VIII of the Constitution makes the difference and marks the distinction between the two situations.

In attempting to put a strained interpretation on Article VIII, appellant is asking this Court to destroy and strike out part of the Article. If, in drafting Article VIII, it was intended to exclude the rights of grazing

from the protected rights, it would have been a simple matter to have so limited the protection. Appellant is asking this Court to give no meaning whatsoever to the phrase "rights of occupancy of long established allocation."

The question of over-grazing is not an issue. The right of appellees to use the land in question for grazing dates back to 1923 and for two generations before that time. That anyone with that background and experience would deliberately destroy his range by overgrazing is unbelievable. The testimony of witness Wagner (R 100) is but an opinion and evidently not taken seriously by the Court as there is no finding on that question.

The right of residence and improvements and the grazing rights are so interwoven that to destroy one is to destroy the value of the others. The appellant's interpretation of Article VIII would completely remove the protection which it intended to give.

The last page of Appellant's Brief discusses the minute entry ordering judgment in favor of the defendant (R 26-27). We agree with the appellant's reasoning that it is not for the Court to solve the Government's problems by determining in this case how the rights of defendants might be modified. Certainly it is not the province of this Appelate Court to make such a determination. If there is a way that the Department might modify the rights of the defendants, it certainly is not to be done in the manner attempted in this case. Until that problem is solved properly, the defendants could not be guilty of trespass as charged in the Complaint.

At the very outset of the argument (Appellant's Brief, P 6), appellant's Brief is in error in stating that the trial court's holding was to the effect that because West was a white man and could not join the association, the Ordinance was invalid as to the entire family. There was no such finding or conclusion by the trial court.

All of the property involved, including the cattle, belonged to members of the Tribe. Mrs. West lost none of her rights by marrying a white man (25 U.S.C. 182). The trial court took judicial notice of the community property law of the State of Arizona. Under that law, Mrs. West had such a title and interest in the property as to entitle her to the same rights as any other member of the Tribe.

Appellant also argues in the latter part of the Brief (P 10) that our remedy is by making a claim under the provisions of Paragraph 2, Article III of Ordinance 22 (R 16).

If Ordinance 22, in any manner, affects defendants' rights, then the Government should have invoked the provisions of the Ordinance before taking the arbitrary action which was taken in this case by Agent Crow.

We were summarily notified to remove our cattle from the reservation. When we failed to comply, the cattle were arbitrarily seized. We can find no provision in the Constitution or in any ordinance justifying such action. At no time did the Government, or its Agent, Superintendent Crow, recognize any rights of the defendants but deliberately set out to destroy them financially without the slightest indication that any consideration whatsoever would be given to the im-

provements or to their right of long established allocation. The Government now says that we must go before the very people and the Department that would destroy us and let them determine our rights.

We repeat, we do not believe it is for this Court, in connection with this appeal, to determine the procedure which should have been, or should now be followed.

All this Court is asked to decide is whether the trial court was right in determining that we were not guilty of trespass. Under the facts and applicable law, we do not see how the Court could have come to any other conclusion.

We respectfully submit that the judgment of the District Court should be affirmed.

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